Articles

Grandparent Access: A Model Statute

Patrícia S. Fernández*

> It is a biological fact that grandparents are bound to their grandchildren by the unbreakable links of heredity. It is common human experience that the concern and interest grandparents take in the welfare of their grandchildren far exceeds anything explicable in purely biological terms. A very special relationship often arises and continues between grandparents and grandchildren. The tensions and conflicts which commonly mar relations between parents and children are often absent between those very same parents and their grandchildren. Visits with a grandparent are often a precious part of a child's experience and there are benefits which devolve upon the grandchild from the relationship with his grandparents which he cannot derive from any other relationship.[1]

As the court opinion quoted above recognizes, for many children, the relationships that develop with their grandparents are happy ones; visitation means special treats, doting attention, and much affection without the day-to-day conflicts that often arise in the parent-child context. Some children, however, will miss out on this bonding process, or have it prematurely terminated, due to irreconcilable differences between their parents and grandparents.

Research supports the intuitive assumption that children who are deprived of this bonding process lose something valuable. Social scientists have identified at least four "symbolic" roles that help explain the ways in which grandparents influence their families.[2] The "being there" role requires nothing more than a grandparent's presence and may help younger generation members in two ways. First, this presence "mitigates against the obtrusive events of the outside world and disruptive events of role transitions. . . .[and] serves to maintain the identity of the family."[3] In times of transi-

* Patrícia S. Fernández is an attorney with the law firm of Brown, Rudnick, Freed & Gesmer, Boston, MA, where she specializes in family law. Ms. Fernandez is a graduate of Yale Law School and Wellesley College.

1. Mimkon v. Ford, 332 A.2d 199, 204 (N.J. 1975).
2. Bengtson, Diversity and Symbols in Grandparental Roles, in Grandparenthood 21 (V. Bengston & J. Robertson eds. 1985).
3. *Id.*

tion, such as after the birth of a sibling or during divorce, a grandparent's presence may exert a calming influence on grandchildren. Second, just by being there, grandparents provide an important stabilizing influence particularly important for children born of early teenage mothers.[4]

The second symbolic role played by grandparents is that of "family watchdog."[5] In this role, the grandparent is alert for signs of abuse or neglect that might indicate that the family will need active care and protection. Third, an "arbitrating" role may be assumed when grandparents actively negotiate between parents and children concerning values and behaviors that may be more central, in the long run, to family continuity and individual enhancement than those that the parents' authority status allow to be expressed.[6] Such negotiation may also occur when grandparents downplay volatile or disruptive differences between parents and children. The fourth important symbolic role for grandparents is as "interpreters" of the family's history. Grandparents may help grandchildren build connections between the family's past, present, and future, which help children form a firmer sense of identity.[7]

Beyond these symbolic roles, grandparents can serve a much different function in families that are unstable due to abuse or neglect. In these cases, grandparents may be able to provide stability for the children by monitoring the situation. Such monitoring, depending on the severity of the problem, may be in lieu of, or in addition to, state supervision. Children in these situations may be better able to cope with a less-than-ideal family environment when grandparents provide them with unconditional affection, support, and attention.[8] Grandparents may also be of assistance to children who have been deemed by the state "delinquent" or "in need of supervision."[9]

---

4. *Id.* at 22
5. *Id.*
6. *Id.* at 23.
7. *Id.* at 24.
8. Some evidence, however, suggests that parents who abuse their children have been abused themselves. *See generally* Cerkovnik, The Sexual Abuse of Children: Myths, Research, and Policy Implications, 89 Dick. L. Rev. 691 (1985). If grandparents are shown to have been abusers, it is inappropriate to expect them to monitor the abusive behavior of their own children. One statute specifically denies visitation to grandparents who have a previous history of abusive conduct. *See* Tenn. Code Ann. § 30-3-5 (Supp. 1987).
9. At least one state has seen fit to grant grandparents standing to petition for visitation in this context. *See* Tex. Fam. Code Ann. § 14.03(e)(4) (Vernon 1986).

Recognizing that grandparent access[10] may have a beneficial influence on children, legislatures in all 50 states have enacted statutes providing grandparents with legal recourse if they are denied access to their grandchildren.[11] This development reverses the common law doctrine that usually barred such intrusion into the nuclear family. Unfortunately, virtually all of these statutes are poorly drafted and raise more questions than they answer. The goals of these statutes are unclear, and the standards for decision-making are generally too vague to be of help to a judge facing an actual controversy.

The model statute proposed in this Article relies on the assumption that nuclear family autonomy is so important that state intervention in defense of grandparent access is warranted only when such access will maintain a relationship that is important and beneficial to the child. Accordingly, the proposed model statute uses a two-part test to determine when access is warranted. First, a "sub-

10. I use the word "access" to convey a sense of broad contact with the child, including phone calls and letters. In this Article, "visitation" is used synonymously with "access."

11. Ala. Code § 30-3-4 (Supp. 1986); Alaska Stat. § 25.24.150 (1987); Ariz. Rev. Stat. Ann. § 25-337.01 (Supp. 1987); Ark. Stat. Ann. § 34-1211.2 (Supp. 1985); Cal. Civ. Code § 197.5 (West 1982); Colo. Rev. Stat. § 19-1-116 (Supp. 1986); Conn. Gen. Stat. § 46b-59 (1985); Del. Code Ann. tit. 10, § 950(7) (Supp. 1986); Fla. Stat. § 61.13(2)(c) (1984); Ga. Code Ann. § 19-7-3 (Supp. 1982); Haw. Rev. Stat. § 571-46(7) (1976); Idaho Code § 32-1008 (1983); Ill. Ann. Stat. ch. 40, para. 607(b), ch. 110 1/2, para. 11-7.1 (Smith-Hurd Supp. 1987); Ind. Code Ann. § 31-1-11.7-2 (Burns 1987); Iowa Code Ann. § 598.35 (West 1981); Kan. Stat. Ann. § 38-129 (1986); Ky. Rev. Stat. Ann. § 405.021 (Baldwin 1986); La. Rev. Stat. Ann. § 9:572 (West Supp. 1987); Me. Rev. Stat. Ann. tit. 19, § 752(6) (Supp. 1987); Md. Fam. Law Code Ann. § 9-102 (1984); Mass. Gen. Laws Ann. ch. 119, § 39D (West Supp. 1987); Mich. Comp. Laws Ann. § 722.27(b) (West Supp. 1987); Minn. Stat. Ann. § 257.022 (West 1982); Miss. Code Ann. § 93-16 (Supp. 1986); Mo. Ann. Stat. §§ 452-400(3), 452.402 (Vernon 1986); Mont. Code Ann. § 40-9-102 (1983); Neb. Legislative Bill 105 (Apr. 10, 1986); Nev. Rev. Stat. § 123.123 (1986); N.H. Rev. Stat. Ann § 458.17 (Supp. 1987); N.J. Stat. Ann. § 9:2-7.1 (West 1976); N.M. Stat. Ann. § 40-9 (1986); N.Y. Dom. Rel. Law § 72 (Consol. Supp. 1986); N.C. Gen. Stat. §§ 50-13.2(b) (1984); N.D. Cent. Code § 14-09-05.1 (Supp. 1987); Ohio Rev. Code Ann. § 3109.05 (Baldwin Supp. 1986); Okla. Stat. Ann. tit. 10, § 5 (West 1987); Or. Rev. Stat. §§ 109.121, 109.123 (1985); Pa. Stat. Ann. tit. 23, §§ 5301-5313 (Purdon Supp. 1987); R.I. Gen. Laws § 15-5-24.2 (Supp. 1986); S.C. Code Ann. § 20-7-420 (Law. Co-op 1985); S.D. Codified Laws Ann. § 25-4-53 (1984); Tenn. Code Ann. § 36-6-301 (1984); Tex. Fam. Code Ann. § 14.03(d) (Vernon 1986); Utah Code Ann. § 30-5-2 (1984); Vt. Stat. Ann. tit. 15, §§ 1011-1016 (Supp. 1987); Va. Code Ann. § 20-107.2 (Supp. 1987); Wash. Rev. Code Ann. § 26.09.240 (1986); W. Va. Code §§ 48-2-15(b)(1), 48-2B-1 (1986); Wis. Stat. Ann. § 767.245(4) (West 1981); Wyo. Stat. § 20-2-113(c) (1987).

The federal government also has seen fit to address the problem. The House Select Committee on Aging and the Senate Subcommittee on Separation of Powers have recently recommended that the National Conference of Commissioners on Uniform State Law consider drafting a uniform law on grandparent access. *See* Grandparents: The Other Victims of Divorce and Custody Disputes, 1983: Hearings Before the Subcomm. on Human Services of the House Select Comm. on Aging, 97th Cong., 2d Sess. (1982); S. Con. Res. 40, 98th Cong., 1st Sess. (1983).

stantial" relationship with the grandparent, as that term is defined in the model statute, must exist. Second, if a substantial relationship exists, the judge must consider criteria enumerated in the statute to determine whether access should be granted. These criteria attempt to balance the child's interest in the continuity of an important relationship with a grandparent and the child's interest in nuclear family autonomy. If a substantial relationship with a grandparent does not exist, judicial inquiry should end unless it is determined that the grandparent may play a beneficial role in monitoring a nuclear family experiencing difficulty in ways potentially harmful to the child.[12]

The model statute attempts to correct the inadequacies of existing legislation by clearly defining goals and decisionmaking criteria. It thus limits judicial discretion by preferring legislatively articulated values over judicially created values. It does not discriminate on the basis of the type of "family" a child has. Instead, it generally requires that a child have established a substantial relationship with a grandparent before the best interests of the child are examined.

Defining standards and establishing criteria for decisionmaking are not easy tasks. The lack of consensus about what is "best" for children will make any legislative resolution appear arbitrary to some. Our inadequate knowledge about human behavior and development and our inability to predict the future must be recognized as problems inherent in any decision about a child's welfare. There are also difficulties in trying to make general guidelines for a large number of children, each of whom will have different backgrounds, needs, and unique circumstances. In spite of these difficulties, the task is well worth attempting in order to increase predictability, decrease legal and emotional costs, encourage privately negotiated agreements, and, most of all, limit judicial discretion. Requiring judges to articulate their reasoning in detailed findings of fact, as the model statute recommends, will not only ameliorate some of the problems listed above, but also will facilitate the dialogue between the judiciary and the legislature in formulating workable standards.

I. Nuclear Family Autonomy and Grandparents' Rights at Common Law

Nuclear family autonomy, that is, the premise that parents generally have the right to raise their children free from state intrusion,

12. For example, a child residing with an abusive or neglectful parent whose conduct is not so extreme as to warrant removal of the child from the home might benefit from court-ordered grandparent access.

has long been an important American value.[13] Proponents of this view emphasize that parents are granted legal authority over their children and must make decisions on their behalf according to the parents' own moral values. State intrusion into family matters must be minimal, the argument continues, for it is only justified when parental conduct endangers the child's welfare. Thus, state intervention may be permissible when a parent withholds consent for necessary medical procedures[14] or when a parent refuses to send a child to school.[15] Even when state intervention may be indicated, however, family autonomy adherents insist that it be in the least intrusive form.[16] Thus, educating abusive or neglectful parents about better parenting skills or providing supervision for troubled families are methods of intervention to be preferred over immediately and permanently removing the child from the home.

As a practical matter, the concept of parental discretion makes sense. The state does not have the resources or expertise to supervise the upbringing of every child within its jurisdiction.[17] Perhaps more importantly, there is little consensus on the "proper" way to rear a child. Even in the few areas in which there may be general consensus—for example, that a child should not be abused—there is not consensus on specific issues, such as what constitutes "abuse."

The heterogeneity of American society and culture and the resulting lack of consensus about good child-rearing practices indicate that parents must be given discretion in managing the day-to-day details of their children's lives. Since parenting is a learned skill, this discretion would include the right to make non-endangering

13. For the proposition that a realm of family privacy exists that the state cannot enter, see, e.g., Wisconsin v. Yoder, 406 U.S. 205 (1972)(Amish children cannot be compelled to attend public schools when they and their parents find it contrary to religious beliefs); Stanley v. Illinois, 405 U.S. 645 (1972)(unwed father cannot be denied custody of his illegitimate children after their mother's death without due process hearing); Meyer v. Nebraska, 262 U.S. 390 (1923)(restriction on teaching foreign languages in schools violates fourteenth amendment). *See also* J. Goldstein, A. Freud & A. Solnit, Before the Best Interests of the Child 3-25 (1979).

14. For example, the state may insist that a child receive certain inoculations before entering public school, or, in the absence of such inoculations, may insist that the parents renew the physician's certificate every two months. *See* Mass. Gen. L. ch. 76, § 15 (1982); Commonwealth v. Childs, 299 Mass. 367 (1938). And in certain life-threatening conditions, the state may allow others to authorize life-saving medical care over parental objection. *See, e.g.*, In re Custody of a Minor, 379 N.E.2d 1053 (Mass. 1978).

15. *See generally* Wisconsin v. Yoder, 406 U.S. 205 (1972).

16. *See, e.g.*, Goldstein, Medical Care for the Child at Risk: On State Supervention of Parental Autonomy, 86 Yale L.J. 645 (1977); Goldstein, Freud & Solnit, *supra* note 13.

17. Critics of foster care, for example, have pointed out that even when a child is expressly committed to the state's supervision, disastrous consequences may result. *See* Mnookin, Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy, 39 Law & Contemp. Probs. 226 (Summer 1975).

mistakes in child-rearing. The concept of family autonomy includes a right to undivided parental authority over children so long as parents are considered fit,[18] a right to be free from public embarrassment,[19] and a right to privacy and intimacy within the nuclear family.[20]

Although grandparents may have an interest in establishing and maintaining relationships with their descendants, this interest traditionally has been considered less important than children's and parents' interests in nuclear family autonomy. The common law viewed grandparents' interests as "moral, and not legal" in nature.[21] Thus, when children were in the custody of parents, grandparents had no judicially enforceable right of access to them. Exceptions could arise in unusual circumstances, such as when the custodial parent was unfit,[22] when the parent had abandoned the child,[23] when the grandparent had been a primary caretaker,[24] or when a stipulation expressly accorded the grandparents a right to visitation.[25]

Several policy reasons were usually stated for the common law rule:

(1) A parent's obligation to permit the grandparents contact with the child was a "moral," not "legal," one, and therefore grandparents lacked standing to petition the court;

(2) Granting visitation to the grandparents would divide parental authority, thereby undermining it;

(3) The best interests of children required that children not be "shattered in the crossfire" between conflicting parents and grandparents;

(4) When a conflict arose between parents and grandparents, in the interest of family privacy and autonomy, the parents alone should make the decision, without having to account for their motives; and

---

18. *See* Succession of Reiss, 15 So. 151, 152 (La. 1894) (dicta).

19. 15 So. at 152.

20. 15 So. at 152. *See also* Zaharoff, Access to Children: Towards a Model Statute for Third Parties, 15 Fam. L. Q. 165, 171 (1981).

21. 15 So. at 152; Smith v. Painter, 408 S.W.2d 785, 786 (Tex. Ct. App. 1966), *writ. ref'd n.r.e.*, 412 S.W.2d 28 (Tex. Sup. Ct. 1967)(per curiam).

22. *See* 15 So. at 152; Evans v. Lane, 70 S.E. 603 (Ga. Ct. App. 1911). *See also* discussions in Jackson v. Fitzgerald, 185 A.2d 724 (D.C. 1962); Lee v. Kepler, 197 So.2d 570 (Fla. Dist. Ct. App. 1967).

23. *See* 15 So. at 152.

24. *See* 70 S.E. at 603. *See also* Benner v. Benner, 248 P.2d 425 (Cal. Dist. Ct. App. 1952); Foster & Freed, Grandparent Visitation: Vagaries and Vicissitudes, 23 St. Louis U.L.J. 643, 646 (1979).

25. *See* 248 P.2d at 426; Boyles v. Boyles, 302 N.E.2d 199 (Ill. App. Ct. 1973); Bookstein v. Bookstein, 86 Cal. Rptr. 495 (Cal. Ct. App. 1970). *But see* People ex rel. Marks v. Grenier, 10 N.E.2d 577 (N.Y. 1937)(per curiam).

(5) Judicial intervention, being coercive, was not the proper way to settle intra-family disputes; time and ties of nature were more effective.[26]

Over time, these justifications have given way, as evidenced by the proliferation of grandparent visitation statutes. Although most statutes provide few clues to the reasons for their enactment, there are many possible explanations for these legislative developments.

One of the most important is the rising divorce rate, which tripled between 1960 and 1982.[27] In 1982, 25% of children under age 18 in the United States did not live with both natural parents.[28] Noncustodial parents often find it difficult to ensure their parents access to grandchildren, especially if the noncustodial parent moves away after the divorce. Divorce may strain even the best relationships between custodial parents and their former in-laws, and is almost certain to exacerbate already tense relations. This tension may lead custodial parents to deny their children the opportunity to see the ex-spouse's parents, even where the grandchild-grandparent bond has been quite strong in the past. This same scenario may occur as a result of one parent's death.

In either the death or the divorce context, the grandparent access problem may be compounded by remarriage[29] and almost certainly by the subsequent adoption of a child by a stepparent. Most state legislatures seem to be responding to these concerns by granting grandparents standing to petition for grandchild visitation following the death or divorce of their child.[30] Many have gone further and provided that adoption by a stepparent does not create an automatic bar to visitation petitions.[31]

---

26. Gault, Statutory Grandchild Visitation, 5 St. Mary's L.J. 474, 480-81 (1973).

27. Bureau of Census, U.S. Dep't of Commerce, Current Population Reports, Special Studies Series P-20, No. 380, Marital Status and Living Arrangements: Mar. 1982, 4, Table D (1983).

28. *Id.* at 5, Table F. Fifty-eight percent of black children did not live with both natural parents.

29. Eighty-three percent of divorced men and seventy-four percent of divorced women between ages 45 and 54 remarry. Glick, Remarriage: Some Recent Changes and Variations, 1 J. Fam. Issues 455, 466 (1980).

30. At least 45 states permit grandparents to petition for visitation following death or divorce of the parents, or both. *See, e.g.*, Haw. Rev. Stat. § 571-46 (1976)(divorce or other custody disputes); Kan. Stat. Ann. § 38-129(b) (1986)(death only); Mass. Gen. Laws Ann. ch. 119, § 39D (West Supp. 1987)(both); N.Y. Dom. Rel. Law § 72 (Consol. Supp. 1986)(death or "when circumstances show that conditions exist which equity would see fit to intervene").

31. Statutes in at least 18 states specify that grandparents' rights survive stepparent adoptions. *See, e.g.*, Cal. Civ. Code § 197.5 (West 1982); Mass. Gen. Laws Ann. ch. 119, § 39D (West Supp. 1987). In other states, visitation privileges terminate when a step-

Another dramatic trend that may have prompted the enactment of grandparent visitation statutes is the phenomenal increase in illegitimate births to predominantly teenage mothers.[32] Not only are these young women often unprepared emotionally and financially for the burdens of parenting, but evidence suggests that both the mothers and the children are at increased risk of medical complications.[33] More importantly, young mothers' psychological unpreparedness may lead to a higher risk of child abuse.[34] Grandparent access may provide support for the unprepared mother, as well as protection for the child against parental ignorance, abuse, or neglect.

In addition, many unwed mothers continue to reside with their parents after their children are born. Especially in cases where the mother is trying to finish school or hold down a job, a grandparent may do much of the day-to-day parenting. Of course, this return to the grandparental nest also may occur because of divorce, the death of a spouse, or simply the high cost of housing. With parental duties being shared by grandparents, the child may form a very strong attachment to a "custodial" grandparent.

Even outside the teenage pregnancy context, the presence of a monitoring relative may help prevent child abuse. The number of reported child abuse cases has risen dramatically from 8,000 cases in 1968 to 850,000 cases in 1981.[35] As one commentator points out, increasing grandparent access to children may be useful in eliminating such abuse in two ways. First, it may reduce the social isolation of the parent-child relationship. Such isolation is thought to be a contributing cause of abuse. Second, mistreated children may recover better if they have a continuous relationship with an

---

parent adopts and the grandparent is related through the "replaced" parent. *See, e.g.*, Colo. Rev. Stat. § 19-1-116 (1986); Nev. Rev. Stat. § 123.123(4) (1986).

In Illinois, there is a conflict in the case law concerning the effect of stepparent adoption. Contrast In Re Adoption of Schumacher, 458 N.E.2d 94 (Ill. App. 2d 1983) with Lingwall v. Hoener, 464 N.E.2d 1248 (Ill. App. 4th 1984). In New Mexico, so long as a child remains with a surviving natural parent, visitation petitions by any grandparent may be filed. N.M. Stat. Ann. § 40-9-2 (1986).

32. In 1970, 0.8% of children under the age of 18 lived in never-married single parent households. By 1982, this figure had risen to 4.4%. Bureau of the Census, *supra* note 27, at 5, Table E. Approximately 500,000 children are born annually to teenage mothers, and 55% of these are born to unmarried adolescents. N.Y. Times, Feb. 10, 1986, at A14, col. 3. The percentage of babies born to unmarried women has risen to 13.4% for whites and 51% for non-whites. Boston Globe, Apr. 19, 1987, at 18, col. 2.

33. N.Y. Times, *supra* note 32.

34. Arehart-Treichel, America's Teen Pregnancy Epidemic, 113 Sci. News 299 (May 6, 1978).

35. Statistics compiled by the American Humane Society, *reported in* Washington Rep. 1 (May 1984).

adult who can provide "compensatory acceptance, nurturance, and a positive mode for social experiences."[36]

The expansion of grandparent access rights may also be explained by more subtle sociological changes. In other legal contexts, social scientists have pointed to a decline in the use and effectiveness of traditional means of conflict resolution as a stimulus for increasing resort to the legal system.[37] Specifically, community sentiment, peer pressure, religious beliefs, and a feeling of moral obligation may no longer be enough to convince parents to permit visitation. If grandparents are denied access to the legal system, there may be no other forum in which their grievances can be effectively addressed.

The result of all these factors has been that legislators in all 50 states have departed from the common law emphasis on nuclear family autonomy and enacted grandparent visitation statutes. Obviously, there is some feeling that relationships with grandparents are important for children—or vice versa—whether or not social science can establish conclusively the existence of such benefits.[38]

II. Existing Statutes

If legislators have been concerned with the increase in child abuse and teenage parenting, and with the special bonds formed between grandchildren and custodial grandparents, these concerns have not always been evident in the statutes themselves. Only a handful of grandparent access statutes specifically deal with the situation in which a child has resided with grandparents.[39] Only in Texas and Tennessee do statutes specifically enunciate that grandparents of children who have been abused or neglected by their parents may seek visitation.[40] Some statutes address the abuse problem indirectly, however, by permitting grandparents of children in foster

36. Ingulli, Grandparent Visitation Rights: Social Policies and Legal Rights, 87 W. Va. L. Rev. 295, 306-07 (1985)(citations omitted). *But see supra* note 8.

37. Rebell, Judicial Activism and the Courts' New Role, Soc. Pol'y 26 (Spring 1982).

38. For an analysis of the social science research findings, see Ingulli, *supra* note 36, at 298-302.

39. Minn. Stat. Ann. § 257.022(2a) (West 1982)(grandparents have standing if the child has resided with the grandparents for 12 months); Tex. Fam. Code Ann. § 14.03(e)(6) (Vernon 1986)(grandparents have standing if child has resided with them for at least six out of the last twenty-four months preceding the petition).

40. Tex. Fam. Code Ann. § 14.03(e)(3) (Vernon 1986); Tenn. Code Ann. § 36-6-301(c) (Supp. 1987).

care to petition for visitation.[41] Yet others actually may compound the abuse problem by denying standing to grandparents whose children have had their parental rights terminated by the state.[42]

One of the most obvious problems with existing statutes is the distinctions they draw among classes of grandparents. Some grandparents may petition the court for visitation with their grandchildren, while others lack standing. Often, there is also conceptual confusion regarding the nature of the grandparents' rights. They may be conditioned on the related parents' rights—the "derivative rights" theory—on the type of family situation involved, on the child's best interests, or on a combination of these.

A. Derivative Rights Theory.

Under the derivative rights theory, the grandparents' legal status depends on the related parent's legal status.[43] A right to association with the child resides primarily with the parents and only secondarily with the grandparents. Thus a grandparent's derivative right becomes effective only upon legal absence of the related parent. The most common example of this absence is when a natural parent dies. The grandparent may then petition for visitation with the child, since the related parent is no longer able to ensure contact between grandparent and child.

This conceptualization severely restricts the situations in which grandparent access may be granted, since under it a court would not be able to grant such a petition following a divorce. Because noncustodial parents could take children to see their grandparents, these grandparents would have no legal right to petition on their own behalf.

---

41. Abuse is one reason a child may be temporarily removed from parental care. For statutes permitting grandparents of children in foster care to petition for access, see Tenn. Code Ann. § 36-6-301(c) (Supp. 1987); Colo. Rev. Stat. § 19-1-116(1)(b) (1986).

42. Abuse or neglect is one of the many reasons a court may terminate parental rights. For statutes denying parents of children whose parental rights have been terminated standing to petition for access to grandchildren, see Nev. Rev. Stat. § 123.123(4) (1979); N.M. Stat. Ann. § 40-9-4 (1986). *But see* Ga. Code Ann. § 19-7-3(b)(3) (1982); Tex. Fam. Code Ann. § 14.03(c)(5) (Vernon 1986).

43. *See, e.g.*, state statutes listed *supra* note 30 that permit grandparent petitions only where the related parent has died. *See also* In re Gardner, 287 N.W.2d 555, 558-59 (Iowa 1980); In re the Adoption of a Child by M., 355 A.2d 211, 212-13 (N.J. Ch. 1976). *But see* Bennett v. Bennett, 376 A.2d 191 (N.J. Super. 1977), which squarely rejects derivative theory for New Jersey; *Mimkon*, 332 A.2d at 199; Weichman v. Weichman, 184 N.W.2d 882, 885 (Wis. 1971); and Note, Statutory Visitation Rights of Grandparents: One Step Closer to the Best Interest of the Child, 26 Cath. Univ. L. Rev. 387, 397 n.47 (1977).

Another problem stems from the fact that derivative rights are extinguished when the related parental rights are terminated. When a stepfather adopts a child, for example, the natural father's legal rights and obligations end, and the biological paternal grandparents also lose any visitation privileges they had prior to the adoption.[44] Absent express statutory authority, courts have felt themselves constrained to deny visitation after adoption.[45] As one court noted, the case law demonstrates the "tension between the goals of creating a new family unit for adopted children, on the one hand, and of allowing continuing grandparental contact with grandchildren who have lost a parent on the other."[46]

But the nature of adoption has changed over the years. When abortion was illegal and/or unavailable, and the stigma of illegitimate birth was greater, a higher number of newborn infants were put up for adoption. Terminating all ties to the natural parents and extended family made sense and probably was in the child's best interests, since emotional bonds had not yet formed and the adoptive family had a *tabula rasa* from which to develop ties.

Currently, however, many of the children being adopted are older children. Unlike infants, older children may well have developed relationships with extended family members, especially in cases of stepparent adoption, and thus may be situated differently than newborns. But the laws that govern adoption are applied similarly, regardless of the child's age. This can create hardship, especially where grandparents have taken care of the child after the death of a parent or during the child's visits with the noncustodial parent.[47]

In certain existing legislation, the fact that some grandparent-grandchild relationships are formed by adoption is not recognized. This may have undesirable consequences. For example, in *Commonwealth ex. rel. Dogole v. Cherry*,[48] the question presented was "where a husband and wife adopt a minor child, the wife dies, and the husband remarries and joins with his second wife in adopting the child,

44. *But see* statutes listed *supra* note 31 that permit natural grandparents to petition for access after adoption by stepparent.

45. *See, e.g.*, Aegerter v. Thompson, 610 S.W.2d 308 (Mo. Ct. App. 1980); Ex parte Bronstein, 434 So.2d 780 (Ala. 1983); Woodson v. Kilcrease, 648 S.W.2d 72 (Ark. Ct. App. 1983); In re Nicholas, 457 A.2d 1359 (R.I. 1983); Leake v. Grissom, 614 P.2d 1107 (Okla. 1980); *Gardiner*, 287 N.W.2d at 555. *C.f.* Bikos v. Nobliski, 276 N.W.2d 541 (Mich. Ct. App. 1979)(overruled by Mich. Comp. Laws Ann. § 710.60(3) (West Supp. 1987), permitting grandparent visitation following stepparent adoption).

46. *Gardiner*, 287 N.W.2d at 557.

47. *See, e.g.*, In re Adoption of Berman, 118 Cal. Rptr. 804 (Cal. Ct. App. 1975); Malpass v. Morgan, 192 S.E.2d 794 (Va. 1972).

48. 173 A.2d 650 (Pa. Super. Ct. 1961).

should visitation rights with the child be granted to the mother of the deceased first wife, over the objection of the adoptive parents." The court answered in the negative and explained that Bertha Dogole, mother of the first wife, was "neither a blood nor an adoptive relative of the child," apparently meaning that her legal relationship to the child had ended with the second adoption.[49] This decision ignored the substantial relationship the grandmother and grandchild had built through weekly contact during all six years of the child's life.

Such relationships should not be disregarded after adoption, especially if the adoptive parent is a stepparent. If a good relationship between child and grandparent has been established and regular visitation continues after the custodial parent remarries,[50] it seems cruel to prohibit such visitation merely because the stepparent legally adopts the child. From the child's point of view, an adoption decree does not vitiate her affection for her natural grandparents. Depending on the child's age, the adoption arguably could increase her desire to be in contact with her natural grandparents in order to define her identity by knowing her family history. As one court has noted:

> An adopted child may not in all respects be isolated from his or her natural family. Some may perceive an inconsistency in the termination of some rights, but not others, between the adoptive child and the natural family. If such exists, the desire for consistency in the law should not of itself sever the bonds between the child and the natural relatives.[51]

Even if the adoption is in a child's best interests,[52] the disruption of beneficial relationships created by the lack of continuing contact may be traumatic for the child. The same may be said even where the child is adopted by unrelated third parties. The inflexibility of statutes that take a derivative rights approach makes it impossible for the courts to do a case-by-case analysis to determine whether continuing the relationship between the child and her natural family would facilitate or disrupt adjustment to the adoptive parents.

---

49. 173 A.2d at 651.

50. The relationship may be established on a voluntary basis or by court order pursuant to the grandparent visitation statutes mentioned above.

51. People ex rel. Sibley v. Sheppard, 429 N.E.2d 1049, 1052 (N.Y. 1981).

52. *See* Note, Visitation After Adoption: In the Best Interests of the Child, 59 N.Y.U.L. Rev. 633, 636 (1984). "[A] court cannot grant . . . [an] adoption petition unless it finds that such action would be in the child's best interests."

B. Family Situation Theory

Other statutes focus on the type of family situation, rather than on derivative rights, in determining which grandparents have standing to petition for access. For example, some statutes confer standing on grandparents only when their child dies, or after divorce of the parents. Many allow petitions in either situation.[53] One explanation for such statutes is that nuclear family disruption allows the state to intervene in order to protect the child's best interests.[54] The derivative rights theory, however, may be looming unarticulated in the death context. These statutes may really be aimed at protecting the grandparents, or children, from access cut-off by a vindictive parent. Or the justification may lie in the notion that continuing beneficial relationships for the child are most important when a nuclear family disruption has occurred.[55] Unfortunately, the broad wording of these statutes leave unclear the purposes the legislatures intended them to serve.

If nuclear family disruption is the key, there are many situations left uncovered by the majority of statutes. For example, informal or legal separation by the parents is often overlooked.[56] So is prolonged hospitalization,[57] incarceration,[58] temporary or permanent incapacity of one or both parents,[59] or even temporary placement of the children in foster care.[60] Thus, grandparents of children in some situations are treated better or worse than grandparents of children in other situations, all of whom may have nuclear family disruption in common. By failing to articulate the guiding principles that spurred enactment of visitation statutes, legislatures have discriminated among different classes of grandparents for no apparent reason. Such discrimination only adds to the confusion surrounding the nature of the grandparents' rights.

---

53. *See, e.g.*, Alaska Stat. § 25.24.150 (1987); Iowa Code Ann. § 598.35 (West 1981); N.J. Stat. Ann. § 9:2-7.1 (West 1976).

54. *See, e.g.*, Zaharoff, *supra* note 21, at 180-81.

55. *See* discussion and sources cited in Ingulli, *supra* note 36, at 311-32, nn.102-04.

56. Only some statutes mention legal separation. *See, e.g.*, Colo. Rev. Stat. § 19-1-116(1)(a) (1986); N.M. Stat. § 40-9-1 (1978); Alaska Stat. § 25.24.150 (1987).

57. No mention of prolonged hospitalization is made in any visitation statute.

58. Incarceration of a parent specifically gives grandparents standing to petition in Texas. Tex. Fam. Code Ann. § 14.03(e)(1) (Vernon 1986).

59. Incapacity or incompetency of a parent specifically gives rise to grandparent standing in Vermont and Texas. Vt. Stat. Ann. tit. 15, § 1012 (1987); Tex. Fam. Code Ann. § 14.03(e)(1) (Vernon 1986).

60. Grandparents of children in foster care are specifically granted standing in Colorado. Colo. Rev. Stat. § 19-1-116(b) (1986). *See also* Iowa Code Ann. § 598.35 (West 1981).

All such standing distinctions are unnecessary and the model statute proposed herein would eliminate them. Only one question needs to be asked in all grandparent visitation cases: Is the child's relationship with the grandparent so important to the child's development that its continuation, and therefore state intrusion into the nuclear family, is warranted?

C. Best Interests Theory

Perhaps the most important way in which current legislation has failed to define grandparent visitation rights adequately is by its consistent conditioning of such rights on the child's best interests.[61] While in theory this may be the correct approach, the conditional nature of the right is complicated by the fact that the child's best interests are never defined by guiding principles and the criteria that are to be considered in making such a determination are enunciated only rarely.[62]

Legislative pronouncements on a child's best interests usually provide no guidance as to what exactly those interests are. Presumably, children share an interest in family privacy and intimacy with their parents. Children are legally incompetent to make major decisions for themselves, and therefore need autonomous parents to do so. Thus, both parents and children share an interest in undivided parental authority.

Family law commentators Goldstein, Freud, and Solnit point to another interest—the need of every child for unbroken continuity of an affectionate and stimulating relationship with an adult.[63] Presumably, this too is a goal of nuclear family autonomy: to provide an atmosphere in which such relationships can develop between parents and children free from outside interference.

But while the interests of parents and children may converge in many ways, there are also situations in which they are not the same. For example, when a child has formed a substantial, intimate, affectionate, and stimulating relationship with an adult outside the nuclear family and a conflict arises between this adult and the parent, parental interests in family autonomy and a child's interest in maintaining this outside relationship will necessarily conflict, even in an

61. All 50 statutes have a "best interests of the child" standard or allow visitation "in the judge's discretion."

62. Only three statutes provide enumerated criteria. *See* Me. Rev. Stat. Ann. tit. 19, § 752(5) (Supp. 1987); Vt. Stat. Ann. tit. 15, § 103 (Supp. 1987); Va. Code Ann. § 20-107.2(1) (Supp. 1987).

63. Goldstein, Freud & Solnit, *supra* note 13, at 6.

"intact" family. It is this conflict that is at the heart of grandparent visitation statutes.

Existing legislation does not identify this essential conflict between the interests of parents and children. Especially in the adoption situations discussed above, it is clear that the child may have a variety of interests not protected by the visitation statutes, perhaps due to a hesitation on the part of legislators to give children legal rights independent of those of their parents or due to concern with the preservation of nuclear family autonomy.

Theoretically, grandparent visitation statutes should address the conflict that occurs when parents, presumably acting in their child's best interests, decide not to permit grandparent visitation and grandparents petition for visitation, presumably representing the child's interest in maintaining a substantial relationship. The goal of any grandparent access statute must be to define the conditions under which a child's interests can outweigh those of her parents.

In practice, however, the best interests of the child standard is too broad and vague to be of practical use to courts confronted with this grandparent visitation decision. An analysis of the case law in states without enumerated criteria reveals that the decisions generally are based on whatever criteria the judge feels is important.[64] Such an emphasis raises a problem; the decision as to whether a grandparent is permitted visitation can be based solely on criteria that are unstated at the onset of litigation and not subject to discovery. As a practical matter, a litigant may never discover the decision-making criteria. In Massachusetts, for example, probate and family court judges are not required to file findings of fact and conclusions of law unless one party files a notice of appeal or makes a motion requesting them to do so prior to closing arguments.[65]

Other statutes provide one or two items for a judge to consider, but these statutes are far from comprehensive. For example, in Missouri, "[t]he court shall determine if the visitation by the grandparent would be in the child's best interest or if it would endanger the child's physical health or impair his emotional development."[66] Virginia directs the court to look at the "needs" of the child.[67]

64. *See generally* Note, Visitation Rights of a Grandparent Over the Objection of a Parent: The Best Interests of the Child, 15 J. Fam. L. 51 (1976-77). For a sampling of the variety (or dearth) of criteria relied on, see, for example, *Mimkon*, 332 A.2d at 201; Lo Presti v. Lo Presti, 355 N.E.2d 372, 374-75 (N.Y. 1976); Williams v. Miller, 385 A.2d 992, 993-94 (Pa. Super. Ct. 1978).

65. Mass. R. Civ. Pro. § 52(a) (1987).

66. Mo. Rev. Stat § 452.400.3 (1986).

67. Va. Code Ann. § 20-107.2(1)(d) (Supp. 1987).

The effect on the parent-child relationship that visitation by grandparents might have is an element in several statutes. It generally is framed in two ways: the possibility that visitation will have a detrimental effect on the parent-child relationship[68] or the possibility that the grandparent may be able to facilitate and encourage a close relationship between parent and child.[69] The child's preference is sometimes considered, if the child is thought old enough to express a freely formed opinion.[70] The weight accorded to the child's preference in case law has ranged from that of an additional factor justifying the decision to that of a factor not worthy of consideration because it is a product of parental influence.

D. Other Theories

Three statutes seem to support the "substantial relationship" framework outlined in this Article. North Carolina provides for grandparent visitation rights following the adoption of the child by a stepparent or relative where "a substantial relationship exists between the grandparent and the child."[71] Nebraska's new statute allows a grandparent to seek visitation with a minor grandchild in certain situations, but the court must find by clear and convincing evidence that there is or has been "a significant beneficial relationship between the grandparent and child, that it is in the best interests of the child that such relationship continue, and that such visitation will not adversely interfere with the parent-child relationship."[72] The Idaho statute is most explicit: Only those grandparents who "have established a substantial relationship with a minor child" may seek visitation.[73] Statutes in a number of other states make the nature of the relationship an element of the best interests test.[74] However, no statute defines a "substantial relationship."

68. Minn. Stat. Ann. § 257.022 (West 1982); N.D. Cent. Code Ann. § 14-09-05.1 (Supp. 1987). *See also* Layton v. Foster, 466 N.Y.S. 2d 723 (N.Y. App. Div. 1983), *aff'd*, 61 N.Y.2d 747 (N.Y. 1984).

69. Vt. Stat. Ann. tit. 15, § 1013(b)(7) (Supp. 1987); Nev. Rev. Stat. Ann. § 123.123(1)(g) (Supp. 1987).

70. Vt. Stat. Ann. tit. 15, § 1013(b)(6) (Supp. 1987); Conn. Gen. Stat. § 46b-59 (1985); N.H. Rev. Stat. Ann. § 458:17(VI) (1983). *See also* Commonwealth ex rel Flannery, 30 A.2d 810 (Pa. Super. Ct. 1943).

71. 1985 N.C. Sess. Laws 575.

72. Neb. Legislative Bill 105 (Apr. 10, 1986).

73. Idaho Code § 32-1008 (1983).

74. Vt. Stat. Ann. tit. 15, § 1013(b)(3) (Supp. 1987)(the court shall consider "the nature of the relationship between the petitioner and the grandchild and the desirability of maintaining that relationship"); Nev. Rev. Stat. § 123.123(1) (1986)("the court shall consider the amount of personal contact between the petitioner and the child which occurred before the petition for the right to visit was filed"); Minn. Stat. Ann.

The proposed model statute, by contrast, would define "substantial relationship" and only grant grandparent visitation if such a relationship existed between grandparent and grandchild. In considering whether such a continuous, affectionate, intimate, and stimulating relationship existed, the court would consider the amount of time the child spent alone with the grandparent, the frequency and regularity of such contact, and the frequency of letters and phone calls to and from the grandparent.

If the existence of such a relationship were established, the court then would consider specifically enumerated criteria to determine whether visitation would be in the child's best interests. Such criteria would include assessment of the child's psychological and physical needs, the effect on the parent-child relationship, and the child's expressed preference, among others. And in certain defined, exceptional circumstances, the court could consider these enumerated criteria and grant visitation even if a substantial relationship did not exist.

III. Assumptions Used in Formulating a Solution

Under the model statute proposed here, the right to grandparent access is one that belongs to the child, if certain conditions can be met. The goal of a grandparent access statute must be to maintain the substantial relationships with grandparents that have already formed. The goal is not to create such relationships, except in extreme circumstances where the grandparent may provide a beneficial monitoring presence when the parent is endangering or unable to control the child. However, even where substantial relationships or extreme circumstances exist, access should not be granted unless it will serve the best interests of the child. In order to improve on existing grandparent access legislation, the model statute defines specific criteria to guide a court's determination.

The model statute is predicated on the assumption that one of the basic needs of every child is for a stable, continuing, affectionate, intimate, and stimulating relationship with an adult. Children are presumed to have such relationships with their custodial parents. A

§ 257.022(1) (West 1982)("The court shall consider the amount of personal contact between the parents or grandparents of the deceased parent and the child prior to the application"); Me. Rev. Stat. Ann. tit. 19, § 752(5)(B) (Supp. 1987)(the court shall consider the "relationship of the child with the child's parents and any other persons who may significantly affect the child's welfare"); N.D. Cent. Code § 14-09-05.1 (Supp. 1987). None of the above statutes gives guidelines for deciding how much contact with the child is enough to establish a substantial relationship.

child may or may not have formed other such relationships outside the nuclear family.[75] In addition, the model statute recognizes the fact that nuclear family autonomy is an important and necessary American value. The standard used in measuring whether or not a grandparent-child relationship should be judicially sanctioned reflects this value by preferring private ordering and only maintaining those relationships with grandparents that are substantial and necessary to promote the child's healthy growth and development. Where extreme circumstances indicate that a grandparent may serve as a beneficial monitoring presence for an unstable family, the goal would still be to minimize the need for future state intervention by preferring grandparent involvement rather than state agency supervision. Even where the potential for beneficial monitoring exists, access would be granted only when consideration of enumerated criteria suggests that it will be helpful rather than detrimental to the child and the nuclear family.

Consequently, if no substantial relationship exists and the endangering exceptional circumstances are not present, the grandparent's petition is to be dismissed without further inquiry. If the substantial relationship exists or the endangering exceptional circumstances are present, however, the court shall use enumerated criteria to determine whether access is in the child's best interests.

The model statute's focus on the child's relationship with the grandparents creates a stringent threshold test that many grandparents will not be able to pass. Consequently, the barriers to suit for certain categories of grandparents that appear in many existing statutes are unnecessary. For example, when a child is in an intact nuclear family or has been adopted by a stepparent, some existing statutes deny standing to the grandparent. From the child's point of view, if all of the criteria under the proposed statute indicate that visitation is in the child's best interests, the legal distinctions between these situations and others where standing is not an issue seem irrelevant. Thus, the proposed statute eliminates such unnecessary legal line-drawing.

75. For purposes of this Article, I have limited my discussion to grandparents, although this is an artificial barrier. Some statutes permit great-grandparents, other relatives, or other third parties to petition for access, and although I do not address these situations, the guidelines proposed here may be applicable. *See, e.g.*, Ariz. Rev. Stat. Ann. § 25-337.01(B) (Supp. 1987)(great-grandparents); Colo. Rev. Stat. § 19-1-116 (1986)(grandparents). For the third-party approach, see Cal. Civ. Code § 4601 (West 1983); Conn. Gen. Stat. § 46b-59 (1985).

If it is determined, under the proposed statute, that a substantial relationship exists and that visitation should be granted, the judge then must determine how much contact the child is entitled to. In this regard, the court must consider the other outstanding judicial visitation orders that affect the child and the activities and schedules of the parties. Some existing statutes expressly provide the court with the option to appoint a guardian ad litem or an attorney for the child.[76] Others permit the court to refer the matter to a family relations department for investigation and/or evaluation.[77] The model statute allows the court to consult with other professionals to the extent it considers such consultation necessary.

Under the model statute, the initial burden of proof will be placed on the petitioning grandparent to establish that a substantial relationship or exceptional circumstances exist and that consideration of the enumerated criteria warrant visitation. This provision reflects a presumption, stemming from the nuclear family autonomy theory, that the parent is making the proper choice in denying access to the grandparent. Once a visitation order is granted, it may be modified only on a showing of a change of circumstances. This requirement is intended to preserve the status quo after an order is implemented in the hope that the parties will adjust to it. It is also designed to discourage the disgruntled parent or grandparent from petitioning for modification two weeks after an order is implemented. Along the same line, the model statute contains a clause that limits the petitioner's ability to refile if the first petition is denied. Several statutes impose these kinds of limits.[78] The justification is again to buy time for the parties to adjust. This provision may help dissolve some tension and encourage more informal negotiation.

Under the model statute, courts will be required to submit findings of fact in support of their determinations regarding the presence or absence of a substantial relationship, of exceptional

76. Alaska Stat. § 25.24.310(a), (c) (1987)(attorney or guardian ad litem); Mont. Code Ann. § 40-9-102(4) (1985)(attorney).

77. Tex. Fam. Code Ann. § 14.03(g) (Vernon 1986)(where there has been a history of conflict, court may order counseling to facilitate compliance with court order); Wis. Stat. Ann. § 767.245(7) (West 1981)(where visitation rights are interfered with, the family court commissioner shall refer the matter for investigation by the department of family conciliation).

78. *See, e.g.*, Vt. Stat. Ann. tit. 15, § 1015 (Supp. 1987)(once a year absent a real, substantial, and unanticipated change of circumstances); N.M. Stat. Ann. § 40-9-3(A) (1986)(once a year absent a showing of good cause); Colo. Rev. Stat. § 19-1-116(3) (1986)(once every two years absent a showing of good cause); Mont. Code Ann. § 40-9-102(3) (1985)(once every two years unless there has been a significant change in circumstances).

circumstances, and of the enumerated criteria.[79] Such explication is important if the parties are to understand the reasoning of the court and to take its order seriously; it may also help judges to recognize their own biases. Additionally, these findings of fact will facilitate dialogue between the judiciary and the legislature, which will help iron out ambiguities in the statute's meaning or purpose.

The standards for appellate review of decisions made under the model statute are those commonly used in civil cases—a judge's findings of fact will not be overturned unless clearly wrong or unless the judge abused his or her discretion. This standard reflects the presumption that a trial court is in the best position to assess credibility of witnesses and family dynamics.[80]

IV. Model Grandparent Access Statute and Commentary

The first major shortcoming in existing legislation is the failure to identify the purposes that grandparent visitation is thought to serve. Most statutes do not explain whether they intend to provide children with access to grandparents or grandparents with access to grandchildren. These laws also lack any discussion of who, if anyone, has "rights," and how these rights should be factored into visitation decisions.

Second, as discussed above, it appears that little consideration has been given to deciding which situations merit overriding nuclear family autonomy for the sake of the child's needs. For example, in many states, grandparents have standing to petition only when the nuclear family has been disrupted by death or divorce.[81] However, one can imagine many other situations in which intervention may be warranted to protect the physical and emotional well-being of the child: physical or mental illness of a parent resulting in prolonged hospitalization, parental abuse or neglect, parental abandonment, or placement of the child in foster care. As a result, the existing

79. *See, e.g.*, Ark. Stat. Ann. § 34-1211.2 (Supp. 1985)(required only upon denial of visitation); Ill. Ann. Stat. ch. 110 1/2, para. 11-7.1 (Smith-Hurd Supp. 1987)(required only upon denial of visitation); Ind. Code Ann. § 31-1-11.7-7 (Burns 1987)(required only upon denial of visitation).

80. Vermont, for example, does not allow the grandparents to appeal any decision concerning visitation. *See* Vt. Stat. Ann. tit. 15, § 1011(c) (Supp. 1987).

81. At least 45 states permit grandparents to petition for visitation following death or divorce of the parents, or both. *See, e.g.*, Haw. Rev. Stat. § 571-46 (1976)(divorce or other custody disputes); Kan. Stat. Ann. § 38-129(b) (1986)(death only); Mass. Gen. Laws Ann. ch. 119, § 39D (West Supp. 1987)(both). It should be noted that some states do not appear to limit the situations in which grandparents may petition. *See, e.g.*, N.Y. Dom. Rel. Law § 72 (Consol. Supp. 1986); Del. Code Ann. tit. 10, § 950(7) (Supp. 1986); Conn. Gen. Stat. § 46(b)-59 (1985).

framework of most statutes leads to unnecessary discrimination between different categories of grandparents, and raises questions about the circumstances under which the state should provide a forum for intra-family dispute resolution. But the most important problem with these statutes is that the majority provide no criteria for the judge to consider in the visitation determination—visitation may be granted simply when it will be in the child's best interests. The consequences of this vague best interests standard are that judges often will have to impose their own moral values and opinions about child-rearing in the absence of legislative principles. This broad discretion allows for an unarticulated, private agenda to govern a dispute in which the court has no personal interest and is largely incapable of supervising on a day-to-day basis. Allowing a judge to impose personal values arguably is worse than directing him or her to impose values that a legislature has chosen, because a judge is less personally accountable to the public than is the representative legislature. In the grandparent visitation context, for example, the fact that most judges are old enough to have grandchildren themselves may have a tremendous influence on the outcome of any given lawsuit.

In addition, because different courts may weigh competing factors differently, similar cases are not treated alike under the best interests standard. This fact tends to increase litigation. Since it is impossible to predict what a court will decide, there are no legal incentives to negotiate and settle before trial. A trial on the merits can be quite expensive, in both financial and emotional costs, and may be a less than optimal use of scarce judicial resources.

This statute is designed to implement the principle that access to grandparents is a limited right of the child. It is limited because family autonomy concerns create a presumption that the parent as legal guardian of the child is acting in the child's best interests. When a grandparent brings suit, he or she is trying to rebut that presumption, and serves as the nominal petitioner for vindication of the child's limited right.

Preamble:

The public policy guidelines of the statute are severalfold:

1. All children are entitled to enjoy secure, stable, and beneficial relationships with their parents. It is the goal of this statute to maintain these relationships unless they endanger the welfare of the child as defined in the child abuse and neglect laws of this State.

2. If a child has formed a "substantial relationship" with a grandparent, as defined in this statute, and judicial consideration of the enumerated criteria in this statute indicates that maintaining that relationship is in the child's best interests, an access order may be imposed by the court.

3. If no substantial relationship with a grandparent has been formed, the case must be dismissed with prejudice and no judicial consideration of the enumerated criteria is permitted.

4. Even if a substantial relationship with the grandparent has been formed, if judicial consideration of the enumerated criteria reveals that access would not be in the child's best interests, any request for contact will be denied.

5. In exceptional circumstances, a court may consider grandparent access even where a substantial relationship with the grandparent does not already exist. These exceptional circumstances arise where parental conduct endangers the child or where parents are unable to control the child. If, after consideration of the enumerated criteria, the court finds that the grandparent may serve as a beneficial monitoring presence for the child, an access order may be imposed.

6. Because the purpose of visitation is to benefit the child by maintaining a continuous substantial relationship, any benefit to the grandparent is secondary. Because of this focus on the child's benefit, there is no reason to impose artificial limits on which grandparents have standing to petition. Therefore, a grandparent may petition even where a child resides with two natural parents or where a child has been adopted by a stepparent or other third party. Moreover, where the grandparent-grandchild bond is formed by adoption in the first instance, the adoptive grandparent may petition even where the child is subsequently adopted by a stepparent. It is this State's policy that standing to vindicate a child's limited right to grandparent access shall not be limited to "bloodline" grandparents. Standing shall not be granted on a "derivative rights" theory, wherein a grandparent's standing is conditioned on the legal absence of the related parent of the child through death or other circumstances.

7. These policy guidelines are intended to emphasize that grandparent access orders are intrusive to the nuclear family and should only be granted in unusual circumstances. Court orders should maintain only those grandparent-grandchild relationships that are significant enough under statutory criteria to override pa-

rental prerogatives and warrant state intrusion. Procedural restrictions are intended to limit litigation.

I. Purposes:

(a) The goals of this statute are to maintain only those relationships between grandchildren and grandparents that are substantial and to allow access only when it is found to be in the child's best interests after consideration of the enumerated criteria in Section III(b) of this statute.

(b) In the absence of a substantial relationship between the grandchild and the grandparent, it is the goal of this statute to provide a beneficial monitoring presence for the child in certain exceptional circumstances outlined in Section III(d).

II. Definitions:

(a) A "substantial relationship" between a grandparent and a grandchild is one that is continuous, affectionate, intimate, and stimulating to the child. In determining whether a substantial relationship has formed, the following factors must be considered:

(1) the amount of time spent alone with the grandparent;

(2) the frequency of contact with the grandparent;

(3) the regularity of contact with the grandparent over the course of the child's life;

(4) the frequency of letters and phone calls to and from the grandparent.

(b) The following are examples of situations that may give rise to the formation of a substantial relationship between child and grandparent. The examples are illustrative and are not meant to be exclusive.

(1) The child has resided with the grandparent and the grandparent has had de facto custody of the child due to a nuclear family disruption such as parental death, divorce, illness, hospitalization, institutionalization, incarceration, abandonment, or informal or legal separation;

(2) The child has resided with parent(s) and the grandparent in the same household;

(3) The grandparent has been a part-time primary caretaker of the child on a regular basis—e.g., has been the child's babysitter while the parents worked or were otherwise unavailable to care for the child;

(4) The grandparent has provided custodial care for the child for extended periods of time when there were no nuclear family disturbances, such as when the parents were on vacation, during school vacations or holidays, or when the child was home from school due to illness.[82]

(c) A "grandparent" is the biological or adoptive parent of the child's biological parent or the child's adoptive parent.

(d) A "parent" is the child's biological father or mother or adoptive father or mother.

(e) A "nuclear family disruption" is characterized by a temporary or permanent loss or estrangement of one nuclear family member, whether the nature of the family is biological, adoptive, or common law. The following are examples of nuclear family disruptions:

(1) informal or legal separation of the parents, whether married or not;

(2) divorce of the parents;

(3) prolonged illness or hospitalization of a nuclear family member whether for physical or mental health reasons;

(4) institutionalization of a nuclear family member;

(5) incarceration of a parent or other nuclear family member;

(6) state intrusion into the nuclear family caused by an adjudication of abandonment, abuse, or neglect by one nuclear family member toward another;

(7) temporary or permanent legal incapacity or incompetence of a parent caused by a physical or mental disability;

(8) the placement of a child in foster care;

(9) state intrusion into the nuclear family caused by an adjudication of the child as "a child in need of supervision" or "delinquent;"

(10) termination of parental rights.

82. While these examples are not meant to be exhaustive, they are meant to illustrate the high threshold that must be met before a grandparent's relationship with a child will be considered substantial enough to warrant court-ordered visitation. For example, a grandparent who has spent no time alone with the child and/or has visited for one-day periods two or three times a year would not, without more, be considered to have formed the necessary bond with the child. In some ways, this requirement may be punitive for the grandparent who has had a rather "normal" experience, meaning that no primary care for the child has taken place or that past visitation has been infrequent and of short duration. The restriction is intentional. In order to justify an intrusion into nuclear family autonomy, there must be a strong attachment without which the child may suffer. *See infra* text accompanying notes 13-20.

(f) A "change of nuclear family membership" occurs when the parent remarries, or when the parent enters into an intimate relationship with another adult and cohabits with that individual.

III. Substantive Provisions:

(a) In all actions concerning petitions for grandparent access, a hearing will be held to determine whether a substantial relationship, as defined in this statute, exists between the grandparent and the child.

(b) If a substantial relationship is found to exist, or if the nuclear family situation is one that fits under the exceptional circumstances enumerated in Section III(d), the court will consider each of the following criteria to determine whether access to the grandparent is in the best interests of the child:

(1) whether access will promote or hinder the child's psychological or physical development;

(2) whether access will facilitate or disrupt the child's healthy psychological attachments to his or her nuclear family, particularly following a nuclear family disruption or change in membership;

(3) whether access will divide the child's loyalties and have a detrimental effect on the parent-child relationship;

(4) whether the grandparent is willing and able to encourage and facilitate a close and continuing relationship between the child and the other parties;

(5) whether the child is in favor of or against access, if the child is capable of freely forming and expressing an opinion in the matter;

(6) the potential benefits and detriments to the child in granting the visitation order;

(7) the physical and emotional health of the adults involved;

(8) the capacity of the adults involved for future compromise and cooperation in matters involving the child's physical and emotional health and development;

(9) the reasons given by respondents for opposing access, for example, that the petitioners have constantly interfered in the parent-child relationship and criticized parental behavior or decisions that do not endanger the child and are decisions that parents alone should make, such as the

choice of a child's wardrobe, education, or religious training; and

(10) any other factor that the court considers relevant to a fair and just determination regarding access.

(c) If the court finds that no substantial relationship exists and that the nuclear family situation is not one that fits under the exceptional circumstances enumerated in Section III(d), the court shall dismiss the petition without considering the best interests criteria outlined in Section III(b).

(d) In the absence of a significant relationship with the grandparent, the court may consider granting grandparent access in the following exceptional circumstances:

(1) The parent or the spouse or cohabitor of the parent has abused or neglected the child in such a way that endangers the child's well-being, and grandparent access will serve as a beneficial monitoring presence in conjunction with or in lieu of state supervision. If the grandparent has engaged in abusive or neglectful behavior toward either the child or the parent when he or she was a child, this section shall not apply;

(2) The child has been adjudicated "a child in need of supervision" or "delinquent" and grandparent access will serve as a beneficial monitoring presence in conjunction with state supervision; or

(3) The parent is an alcoholic or addicted to illegal substances and grandparent access will serve as a beneficial monitoring presence.

If any of the above circumstances apply, the court will consider the enumerated criteria in Section III(b) to determine whether grandparent access will be in the child's best interests.

(e) Adoption of the child by a stepparent, relative, or other third party is not an automatic bar to grandparent access if:

(1) a substantial relationship exists between the grandparent and the child, and

(2) upon consideration of the enumerated criteria in Section III(b), continued access is in the child's best interests.

(f) In formulating access orders, the court shall strive to make the access order fit into the child's and parents' schedule with the least amount of inconvenience or disruption, for example by scheduling access for times in which the child would normally be in the care of unrelated third parties. The court will consider the follow-

ing factors in determining the type, frequency, and duration of grandparent access:

(1) the frequency and duration of contact with other persons mandated by outstanding judicial orders;

(2) the child's extracurricular activities and schedule;

(3) the parents' activities and schedules; and

(4) reasonable limitations on gifts for the child or telephone calls and letters, or the allowance of telephone calls and letters in favor of a less-frequent visitation schedule.

IV. Procedural Items:

(a) Standing. Any grandparent, as defined in Section II(c) of this statute, shall have standing to petition on behalf of a minor child for access.

(b) Findings of fact. In every matter in which grandparent access is granted or denied, the court shall make detailed findings of fact on the determination regarding the presence or absence of a substantial relationship, of exceptional circumstances, and of the enumerated criteria listed in Section III(b).

(c) Representation of the child. The court, acting *sua sponte* or on the motion of either or both parties, may appoint a guardian ad litem or counsel for the child if such an appointment will facilitate resolution of the matter or aid in the fact-finding process.

(d) Burden of proof. The petitioner must prove that access is in the child's best interests by a preponderance of the evidence.

(e) Expert testimony. The court may hear expert testimony from one or both parties in regard to any matter relevant to the access determination. If one or both parties cannot afford the expense of obtaining expert testimony, the court may appoint an independent expert. The court may also refer the matter to the family relations division for examination and recommendation.

(f) Modification. The court may modify an existing access order on a showing of change of circumstances. In a hearing on a complaint for modification, the burden of proof will be on the moving party to show that a change of circumstances warrants a change in the access order.

(g) Limits on refiling. If a petition for access is denied because no substantial relationship exists, no exceptional circumstances exist, or because access will not be in the child's best interests after consideration of the enumerated criteria in Section III(b), the peti-

tioners may not file another petition for 18 months absent a real, substantial, and unanticipated change of circumstances.

(h) Expiration of order. The court may, in its discretion, either fix an expiration date on the access order or make it an ongoing order. In either case, it may be modified in accordance with Section IV(f).

(i) Appeal. If an appeal is taken from an access order or denial, the appellate court may reverse the trial court's decision only if it is shown that the trial court committed clear error or abused its discretion.

(j) Enforcement. Whenever access rights are granted, the court may issue such orders as shall be necessary to enforce such rights. The court may not issue any order restricting the movement of the child out of the court's jurisdiction if such restriction is solely for the purpose of allowing the grandparent the opportunity to exercise access rights.[83] A court may require any party to post a bond to insure compliance with the access order.[84]

83. *See* Colo. Rev. Stat. § 19-1-116(3) (1986).

84. *See* Zaharoff, *supra* note 20, at 201; Tex. Fam. Code Ann. § 14.03(h) (Vernon 1986)(bond); Vt. Stat. Ann. tit. 15, § 1011(d) (Supp. 1987)(enforcement generally); Mo. Rev. Stat. § 452.400(4) (1986)(enforcement generally).